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# CASE LAW ON UNCITRAL TEXTS
# (CLOUT)

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## INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1).

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## I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 161: CISG 1(1)(a)
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. Vb/92205 of 20 December 1993
Original in Hungarian
Extracts published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1995, 52

The claimant requested the arbitral court to ascertain whether a valid contract had been concluded between the claimant and the respondent for the sale of shares in a Hungarian limited liability company. Both the country of the claimant and that of the respondent were States Parties to the CISG.

The arbitral court distinguished between the sale of goods and the sale of rights and held that the CISG was not applicable since the contract at issue dealt with the sale of rights and thus did not fall within the ambit of the CISG (article 1(1)(a) CISG) .

Case 162: CISG 1(1)(a); 57
Denmark: Østre Landsret
22 January 1996
Dänisches Bettenlager GmbH & Co. KG v. Forenede Factors A/S
Published in Danish: Ugeskrift for Retsvæsen (UfR) 1996, 616 ØLK

The plaintiff, a Danish factoring company, sued the defendant seeking to collect debts based on several invoices for the supply of goods. The debts had been assigned by the defendant's supplier to the plaintiff.

In order to determine which court had jurisdiction, the court applied article 5(1) of the 1968 EU (Brussels) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, according to which an EU domiciliary may be sued in the courts at the place of performance of the obligation in question (payment). The court found that the CISG was applicable since both Germany and Denmark were States Parties to the CISG and the transaction dealt with the sale of goods. The court further held that the court at the seller's place of business had jurisdiction (article 57 CISG).

Case 163: CISG 66; 67
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. VB/96074 of 10 December 1996
Original in English
Unpublished

A Yugoslav company sold and delivered caviar to a Hungarian company. According to their contract "the buyer has to pick up the fish eggs at the seller's address and take the goods to his facilities in Hungary". Payment was due two weeks after the delivery of the goods, at which time the UN embargo against Yugoslavia took effect in Hungary. The claimant assigned the claim for

the price of the goods to a company located in Cyprus. The respondent acknowledged the assignment, but could not pay on the basis that the UN embargo was a force majeure.

The arbitral court found that the damage caused by force majeure had to be borne by the party to whom the risk had passed, i.e., the respondent. In this connection, the arbitral court found it necessary to point out that the risk of freight had to be borne by the respondent, unless the contract of the parties or the applicable law provided otherwise (article 67 CISG). The respondent could not be exculpated by proving that the damage was owing to an act or omission of the claimant (article 66 CISG).

Accordingly, the arbitral court held that the respondent was obliged to pay the price of the delivered goods with interest.

Case 164: CISG 7(2); 39(1); 49(1)
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. VB/94131 of 5 December 1995
Original in German
Unpublished

The claimant, a Hungarian company, and the respondent, an Austrian company, signed a contract for the sale of containers. The respondent paid for only a part of the delivered goods. The claimant requested payment of the outstanding balance. The respondent refused payment owing to the poor quality of the goods.

The arbitral court applied the CISG since, in accordance with the contract between the parties, the law of the country of the claimant was applicable. It was held that the respondent had to pay since it had failed to give notification about the defect of the goods (article 39(1)CISG). In addition, the arbitral court found that the respondent could not declare the contract avoided on the basis that the terms of delivery had not been established by the parties (article 49(1) CISG). As to the interest rate, the arbitral court, referring to article 7(2) CISG, held that it had to be adjusted taking into account the currency in which the contract price had been agreed upon.

Case 165: CISG 1(1)(a); 49(1),(2); 84(2)
Germany: Oberlandesgericht Oldenburg; 11 U 64/94
1 February 1995
Original in German
Unpublished

The Austrian plaintiff, a furniture manufacturer, agreed to manufacture a leather seating arrangement for the German defendant. The defendant sold the furniture to one of its clients, who discovered that the furniture did not conform with the contract. The defendant required the plaintiff to remedy the lack of conformity by repair. Yet, even after the furniture had been repaired, the defendant still found the furniture not to conform with the contract and declared the contract avoided. The plaintiff demanded payment including interest amounting to 13%.

The appellate court found the CISG to be applicable to the contract since both parties were located in Contracting States (article1(1)(a) CISG). It was held that the plaintiff did not have a

payment claim against the defendant since the repaired furniture did not conform with the contract and this amounted to a fundamental breach of the contract which gave the defendant the right to declare the contract avoided (article 49(1)(a) CISG).

In addition, the appellate court found the defendant to have declared the contract avoided within a reasonable time (article 49(2)(b) CISG), even though approximately five weeks had elapsed between the delivery of the repaired furniture and the declaration of avoidance. The plaintiff alleged that according to its general terms and conditions of trade the defendant was obliged to declare avoidance within five days. However, the appellate court found that the plaintiff's general terms and conditions of trade did not apply when a repair had already taken place.

The appellate court also denied a claim for all benefits of possession (profits and advantages of use), which the defendant derived from the furniture in accordance with article 84(2) CISG, since such benefits were deemed not to exist in this case.

Case 166: CISG 1(1)(b); 45(2); 61; 63; 74; 79
Germany: Schiedsgericht der Handelskammer Hamburg
(a) 21 March 1996 (Award on substantive issues)
Published in German: Neue Juristische Wochenschrift (NJW) 1996, 3229
Commented on by Hardt in Neue Wirtschaftsbriefe 1996, 1925;
(b) 21 June 1996 (Award on costs of proceedings)
Original in German; Unpublished

The claimant, a Hong Kong company, and the respondent, a German company, had concluded a general agreement for the exclusive delivery and distribution of Chinese goods. Under this agreement, the claimant was responsible for the business relations with Chinese manufacturers while the respondent was responsible for the distribution of the goods in Europe. On this basis, the parties concluded regularly separate sale of goods contracts. Owing to financial difficulties, a Chinese manufacturer could not deliver the ordered goods to the claimant, who consequently could not fulfill its contractual obligation to the respondent.

The claimant demanded payment of the sum due resulting from previously delivered goods. The respondent set off against this claim a damage claim for lost profit owing to the termination of the business relation with the claimant and refused to pay.

The arbitral tribunal applied the CISG as the relevant German law under article 1(1)(b) CISG. The arbitral tribunal upheld the claimant's demand for payment. It further held that the respondent could set off against the claimant a claim resulting from the breach of the relevant sales contract but not from the general distribution agreement.

With respect to the damages claim for the non-performance of the sales contract, the arbitral tribunal held that the contract could be declared void and damages could be claimed under article 45(2). It further held that a claimant could be deemed to have unlawfully refused performance if it made delivery dependent on payment of arrears from previous sales contracts, even if the parties had agreed on cash payment in advance. The arbitral tribunal also held that the respondent's damage claim was not precluded under article 79 CISG since the financial difficulties of the claimant's Chinese manufacturer were within the sphere of the claimant's responsibility.

With respect to the general distribution agreement, the arbitral tribunal held that the damages claim was without sufficient merit since it was not a consequence of the breach of a sales contract by the claimant in the sense of article 74 CISG.

The arbitral tribunal, in rendering its award on the costs of the proceedings, held that the claimant could claim its attorney's fees for the arbitration proceedings as damages according to articles 61 and 74 CISG. It also held that, if the respondent refused to pay because it set off an alleged claim for damages, the claimant did not have to fix an additional period of time for payment according to article 63 CISG.

Case 167: CISG 1(1)(a); 35; 38; 39(1); 44; 45(1)(b); 74
Germany: Oberlandesgericht München; 7 U 3758/94
8 February 1995
Original in German
Unpublished

The plaintiff, an Austrian insurance company, sued the defendant, a German company, for damages owing to the breach of a sales contract. The defendant had sold its product to the plaintiff's client, an Austrian company, which in turn sold it to a Danish company. The Danish buyer, after receiving and using the goods, informed the Austrian seller about the non-conformity of the goods. The Austrian seller did not inform the defendant, but gave notice to its insurance company, the plaintiff, for compensation. For this purpose, the Austrian seller assigned to the plaintiff its purported damages claim against the defendant.

The applicable German law to the contract for the supply of goods to be produced was the CISG as both companies had their places of business in different States Parties to the CISG, i.e., Austria and Germany (article 1(1)(a) CISG). Accordingly, a possible claim for damages for the delivery of goods not conforming with the contract could be based on articles 45(1)(b) and 74 CISG. But, a possible non-conformity of the delivered goods upon examination was of no importance (articles 35, 38 and 45(1) CISG) because neither the Austrian seller nor the Danish buyer gave notice to the defendant specifying the lack of conformity within a reasonable time pursuant to article 39(1) CISG. The Danish buyer only informed the Austrian seller, who then informed the plaintiff. Yet, this notice was given three months after delivery of the goods and thus deemed not to have been given within a reasonable time. As a reasonable excuse for the failure to give the required notice under article 44 CISG could not be found, the appellate court dismissed the plaintiff's claim.

Case 168: CISG 6; 7(1); 35(1),(3); 40; 45; 74
Germany: Oberlandesgericht Köln; 22 U 4/96
21 May 1996
Original in German
Unpublished

The defendant sold a used car to the plaintiff, both parties being car dealers. The documents showed that the car was first licensed in 1992 and the mileage on the odometer was low. The sales contract included the exclusion of any warranty. The plaintiff later sold the car to a customer, who discovered that the car had been first licensed in 1990 and that the actual mileage on the odometer

was much higher. The plaintiff paid damages to his customer and demanded the same amount as damages from the defendant.

The appellate court held that the plaintiff could claim damages under articles 35(1), 45 and 74 CISG. The plaintiff's damages caused by its liability to its customer could be claimed under article 74 CISG because such damages are foreseeable if goods are sold to a dealer who intends to resell them.

Even though the plaintiff could have detected the car's lack of conformity with the contract, the defendant could not avail itself of article 35(3) CISG since the defendant knew the actual age of the car and thus acted fraudulently. The appellate court held that article 35(3) CISG could not be relied on by a fraudulent seller, referring to the general principles embodied in articles 40 and 7(1) CISG. According to the appellate court, even a very negligent buyer deserves more protection than a fraudulent seller. Although, the exclusion of any warranty was possible under article 6 CISG, it was held to be invalid in this case. The appellate court found that the substantial validity of such a clause was not governed by the CISG. In this case, this question was governed by German law, according to which an exclusion of warranty is invalid if the seller acts fraudulently.

Case 169: CISG 7(2); 53; 61(1)(b); 74
Germany: Oberlandesgericht Düsseldorf; 6 U 152/95
11 July 1996
Published in German: Recht der Internationalen Wirtschaft (RIW) 1996, 958; commented on by Schlechtriem in Entscheidungen zum Wirtschaftsrecht (EWiR) 1996, 843

The German plaintiff produces engines for lawn-mowers. The Italian defendant distributes these engines in Italy according to an exclusive distribution agreement with the plaintiff. The plaintiff demanded payment for delivered engines. Against this claim, the defendant set off a claim for damages caused by an alleged breach of the distribution agreement owing to plaintiff's refusal to deliver further engines.

The appellate court held that the plaintiff could demand payment under article 53 CISG but that a set-off was not possible. The appellate court distinguished between the distribution agreement as a framework contract and the separate sales contracts for the delivery of engines. The separate sales contracts were governed by the CISG. However, the CISG did not cover the distribution agreement, which was governed by the applicable law under conflict-of-laws rules. Under German conflict-of-laws rules, the distribution agreement in this case was governed by Italian law (article 7(2) CISG).

Similarly, the appellate court held that the set-off was not covered by the CISG since it arose from a distribution agreement and had to be determined by the applicable national law, which, in this case, was German law. However, according to German law, the defendant did not demonstrate that it had sustained damages. The appellate court also held that, under articles 61(1)(b) and 74 CISG, the plaintiff could claim attorney's fees for a reminder that was sent prior to the lawsuit.

Case 170: CISG 35; 38; 39; 40; 45(1)(b); 74
Germany: Landgericht Trier; 7 HO 78/95
12 October 1995
Published in German: Neue Juristische Wochenschrift - Rechtsprechungsreport (NJW-RR) 1996, 564

The plaintiff, an Italian wine seller, sued the German buyer (defendant) for payment of the price of wine sold and delivered. The defendant refused payment arguing that the delivered wine was not of merchantable quality since it contained 9% water with which the wine had been mixed. The bottles had therefore been seized and the wine destroyed by German authorities and the defendant had been charged with the costs for these measures. The defendant set off these costs against the plaintiff's claim (articles 45(1)(b) and 74 CISG).

The court found in favour of the defendant. Under the CISG, the defendant could set off its damages against the purchase price as a result of the seller's breach of contract. The court found that the defendant had not lost its right to rely on the non-conformity of the wine even though the defendant did not examine the wine for water after delivery (articles 35, 38 and 39 CISG). In this case the plaintiff could not have been unaware of the non-conformity (article 40 CISG).

Case 171: CISG 25; 49(1)(a)(b); 58
Germany: Bundesgerichtshof; VIII ZR 51/95
3 April 1996
Published in German: Neue Juristische Wochenschrift (NJW) 1996, 2364
Commented on by Karollus in Juristenzeitung (JZ) 1997, 38; by Koch in Recht der Internationalen Wirtschaft (RIW) 1996, 687; by Magnus in Lindenmaier/Möhring, Nachschlagewerk des Bundesgerichtshofs (L/M), CISG No. 3; by Piltz in Europäische Zeitschrift fur Wirtschaftsrecht (EuZW) 1996, 448; by Schlechtriem in Entscheidungen zum Wirtschaftsrecht (EWiR), Art 25 CISG 1/96, 597

The Dutch plaintiff was the assignee of a Dutch company, which had sold four different quantities of cobalt sulphate to the defendant, a German company. It was agreed that the goods should be of British origin and that the plaintiff should supply certificates of origin and of quality. After the receipt of the documents, the defendant declared the contracts to be avoided since the cobalt sulphate was made in South Africa and the certificate of origin was wrong. The defendant also claimed that the quality of the goods was inferior to what was agreed upon. The plaintiff demanded payment. The German Supreme Court held that there were no grounds for avoidance of the contract and thus found for the plaintiff.

According to the Court, the declaration of avoidance could not be based on article 49(1)(b) CISG since the plaintiff had effected delivery. The delivery of goods which do not conform with the contract either because they are of lesser quality or of different origin does not constitute non-delivery.

The Court also found that there was no fundamental breach of contract since the defendant failed to show that the sale of the South African cobalt sulphate in Germany or abroad was not possible (article 49(1)(a) CISG). Thus, the defendant failed to show that it was substantially deprived of what it was entitled to expect under the contract (article 25 CISG).

Lastly, the Court held that the delivery of wrong certificates of origin and of quality did not amount to a fundamental breach of contract since the defendant could obtain correct documents from other sources. Accordingly, the defendant could not refuse payment under article 58

## II. ADDITIONAL INFORMATION

### Corrigenda/Addendum

(i) Case 120

The entry "Oberlandesgericht Köln; 29 U 202/93" in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/9 *should read* "Oberlandesgericht Köln; 22 U 202/93."

(ii) Case 122

The entry "26 August 1996" in the Spanish text of document A/CN.9/SER.C/ABSTRACTS/9 *should read* "26 August 1994."

(iii) Case 143

Below the entry "Hungary: Metropolitan Court" *insert* the entry "21 May 1996" in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/10.

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